(1) The increase in the rate of interest from 15% to 16% pa was made without his consent and knowledge.

(2) No statement of accounts had been rendered by the plaintiff to him.

The rate of interest that has been agreed by the plaintiff with the principal debtor, the first defendant in this suit, on the overdraft extended to him is 15% pa. This is clearly stated in the plaintiff's letter dated 12 April 1982 approving the overdraft of $1.25 million and subject to the terms and conditions contained therein.

The term on the rate of interest payable states '15% pa until further notice' can only mean that the rate is subject to increase or decrease at the discretion of the plaintiff. There is no provision as to prior notice or that the consent of the second defendant needs to be sought before the plaintiff can exercise its right to revise the rate of interest.

This was never in issue before and it was not even raised before the senior assistant registrar but I notice that it was made an issue in an affidavit affirmed and filed on 11 February 1988, a day before the hearing before the senior assistant registrar.

In any event, had it been raised earlier I feel pretty sure that the plaintiff would have accommodated the second defendant by supplying him with the correspondence on the increase in the rate of interest as well as the statement of accounts.

As for the second defendant's objection that the guarantee itself makes no mention of interest, he only needs to look at cl 1 of the guarantee to realize that what he had guaranteed is repayment of the overdraft together with interest with monthly rests which had been extended to the first defendant pursuant to the terms and conditions contained in the plaintiff's letter of approval dated 12 April 1982. Since one of the terms allows the plaintiff the right to increase the rate of interest, I had considered there is no basis for the second defendant's objection as to the increased rate of interest charged by the plaintiff.

Clauses 1 and 15 of the guarantee also give the plaintiff the power to treat the second defendant as a principal debtor and since the second defendant has not until the appeal raised any objection to the amount claimed, I had considered that he had not raised any triable issue as to warrant me upsetting the senior assistant registrar's order. In any event the provisions of the guarantee itself are very clear in meaning and intent and what the plaintiff is claiming is the limit of the guarantee, following the default of the first defendant, plus interest at a rate which I had considered to be permissible under the terms of the letter of approval and the guarantee. To that end, I had dismissed the appeal of the second defendant with costs.

Order accordingly.

Solicitors: *Megat Najmuddin Leong & Co*; *Skrine & Co.*

Reported by *Ng Sheau Jiuan*

Development & Commercial Bank Bhd v Almas Motors Corporation (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C1752 OF 1984
VC GEORGE J
4 MARCH 1988

Contract – Guarantee – Action by bank against guarantors – Banking facilities secured by debenture – Debenture not crystallized – Whether bank was obliged to enforce charge under debenture before proceeding to enforce guarantee – Whether bank was negligent or in breach of implied warranty for not crystallizing debenture – Whether any impairment of security – Contracts Act 1950, ss 92 & 94

Banking – Banking facilities secured by debenture – Action by bank against guarantors – Debenture not crystallized – Whether bank was obliged to enforce charge under debenture before proceeding to enforce guarantee – Whether bank was negligent or in breach of implied warranty for not crystallizing debenture – Whether any impairment of security – Contracts Act 1950, ss 92 & 94

This is the third defendant's appeal against an O 14 judgment against him. The plaintiff bank had granted certain banking facilities to the first defendant company secured by a debenture by which all the assets of the first defendant company were charged to the bank. The second and third defendants are guarantors thereof. The debenture was not crystallized by the bank. The third defendant resisted the bank's claim against him and filed a defence and opposed the O 14 application where ss 92 and 94 of the Contracts Act 1950 were invoked.

Held, allowing the appeal: (1) Two aspects of the suggested defence merit consideration. First, there is the contention that there was an implied warranty that the bank was obliged to enforce the charge under the debenture before proceeding to enforce the guarantee. The second contention is that the bank, in not crystallizing the debenture and appointing receivers, was negligent on its part and also that the omission of the bank to appoint receivers amounts to the bank being guilty of a breach of an implied warranty or of a duty it owed to the guarantors.

(2) In the instant case there certainly was a debenture which was not caused to be crystallized. Whether that amounted to negligence or a breach of implied warranty or duty, and whether or not the third defendant had bargained away his rights preserved by ss 92 and 94 of the Contracts Act 1950, and in any event whether as a result there had been an impairment of the security, all provide triable issues.

(3) Accordingly the appeal is allowed with costs. The O 14 judgment as against the third defendant is set aside and the third defendant is given unconditional leave to defend.

Cases referred to

1 *Bank Bumiputra Malaysia Bhd* v *Esah bte Abdul Ghani* [1986] 1 MLJ 16 (refd)
2 *Ng Yik Seng & Anor* v *Perwira Habib Bank* [1980] 2 MLJ 83 (refd)
3 *Duncan, Fox & Co* v *North & South Wales Bank* (1880) 6 App Cas 1 (refd)
4 *Standard Chartered Bank Ltd* v *Walker & Anor* [1982] 3 All ER 938 (CA) (refd)
5 *Buckeridge* v *Mercantile Credits Ltd* (1981) 56 ALJR 28 (refd)
6 *Provincial Bank of Canada* v *Prince Edward Island Lending Authority* (1976) 59 DLR (3d) 446 (refd)

Legislation referred to

Contracts Act 1950 ss 92, 94
Rules of the High Court 1980 O 14

M Nagarajah for the third defendant/appellant.
N Chandran for the plaintiffs/respondents.

Cur Adv Vult

VC George J: This is the third defendant's appeal against the senior assistant registrar granting an O 14 judgment against him.

The plaintiff bank had granted certain banking facilities to the first defendant company which facilities were secured by a debenture dated 11 April 1983 by which all the assets of the first defendant including all movable and immovable property and undertakings of the company 'both present and future' were charged to the bank.

The second and third defendants guaranteed the payment on demand of the moneys owing by the first defendant.

Due demand was made for payment and on the failure to receive any payment, the instant writ was caused to be issued. The first and second defendants allowed judgment to be entered against them. The third defendant resisted the claim. He filed a defence and opposed the O 14 application.

Two aspects of the suggested defence merit consideration. First there is the contention that there was an implied warranty that the bank was obliged to enforce the charge under the debenture before proceeding to enforce the guarantee. The second contention is that the bank in not crystallizing the debenture and appointing receivers was negligent on its part and also that the omission of the bank to appoint receivers amounts to the bank being guilty of a breach of an implied warranty or of a duty it owed to the guarantors. It was contended that as a result the security provided by the debenture had been impaired. Sections 92 and 94 of the Contracts Act 1950 were invoked:

> s 92. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.
> ...
>
> s 94. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.

Bank Bumiputra Malaysia Bhd v *Esah bte Abdul Ghani*[1] is authority for the proposition that the guarantor has no special right to demand that the bank should call upon the principal debtor to pay off the debt. In that case, *Ng Yik Seng & Anor* v *Perwira Habib Bank*[2] was not followed and *Duncan, Fox & Co* v *North & South Wales Bank*[3] was referred to with approval in support of the proposition that a guarantor cannot decline to pay till the creditor has exhausted the securities placed in his hands by the principal debtor.

However, that does not dispose of the invocation of those two sections of the Contracts Act in respect of which Pollock and Mulla (10th Ed at p 753) says in respect of the Indian ss 139 and 141 which are equipollent to our ss 92 and 94, that:

> Where due to negligence of the creditor the security given by the principal debtor is lost and the right of the surety against the principal debtor is impaired due to any action or inaction of the creditor, the surety is discharged to that extent under the combined effect of ss 139 and 141 of the Act.

For the bank, cl 17 of the document of guarantee is relied upon, as follows:

> The bank shall be under no liability to marshall in our favour any securities or any of the funds or assets which the bank may be entitled to receive or upon which the bank has a claim.

The question that arises is whether cl 17 does away with ss 92 and 94 of the Act and in any event does it or any other provision in the document of guarantee have the effect of exempting the plaintiff from the alleged negligence and alleged acts of breach of warranty and duty and if not, was there in fact negligence or the said breaches that has resulted in impairment of the security.

In *Standard Chartered Bank Ltd* v *Walker & Anor*,[4] it was held that the duty of care owed by the receiver of a company under a debenture in disposing of the company's assets was owed not only to the company but also to a guarantor of the company's liability under the debenture.

In *Buckeridge* v *Mercantile Credits Ltd*[5] it was stated that:

> In a case where the act of a creditor does not discharge a surety, but the creditor has nonetheless sacrificed or impaired a security, or by his neglect or default allowed it to be lost or diminished, the surety is entitled in equity to be credited with the deficiency in reduction of his liability.

However, in that case the judgment did go on to state that the surety's entitlement is lost if he bargains away his right to complain.

In *Provincial Bank of Canada* v *Prince Edward Island Lending Authority*,[6] it was held that:

> A creditor owes a duty to the guarantor of a debt to exercise due diligence in preserving and enforcing securities applicable to the debt guaranteed. Consequently, where a creditor, holding a chattel mortgage and a charge under s 88 of the Bank Act, RSC 1970, c B-1, as security for a debt fails to exercise ordinary prudence to realize the securities and permits the debtor's assets to be dissipated, a guarantor of the debt is discharged from his obligation.

In the instant case there certainly was a debenture which was not caused to be crystallized. Whether that amounted to negligence or a breach of implied warranty or duty and whether or not the third defendant had bargained away his rights preserved by ss 92 and 94 and in any event whether as a result there had been an impairment of the security all provide triable issues.

Accordingly the appeal is allowed with costs. The O 14 judgment as against the third defendant is set aside. The third defendant is given unconditional leave to defend.

Order accordingly.

Solicitors: *Shook Lin & Bok*; *Adnan Sundra & Low.*

Reported by *Wong Kim Fatt*

Chua Kim Suan v Ang Mek Chong

HIGH COURT (KOTA BAHRU) – CIVIL SUIT NO 94 OF 1981
KC VOHRAH J
20 OCTOBER 1987

Succession – Distribution of estate – Deceased died intestate – Entitlement to property – Whether lawful son of deceased – Births and Deaths Rules 1958, r 7 – Births and Deaths Registration Act 1957, ss 14, 32(2), 33(1) & (2)(b)

Evidence – Birth certificate – Admissibility of – Births and Deaths Rules 1958, r 7 – Births and Deaths Registration Act 1957, ss 32(2) & 33(2)(b) – Evidence Act 1950, ss 112 & 114(g)

In this case, the plaintiff sought a declaration that X was not the lawful son of the deceased and therefore not entitled to the deceased's estate. The plaintiff also sought an order that the estate be distributed among herself, one other niece and nephew of the deceased, and the defendant. The plaintiff contended that X was the son of Y and Z and not the son of the defendant. The defendant, however, maintained that X was the lawful son of the deceased and herself.

Held, dismissing the plaintiff's claim:

(1) X's certificate of birth, having been issued under s 14 of the Births and Deaths Registration Ordinance 1957 and in the prescribed form, Form A, under s 7 of the Births and Deaths Rules 1958 and it having been purportedly certified by an officer specified under s 32(2) of the 1957 Ordinance, may be received as evidence under s 33(2)(b) of the Births and Deaths Registration Act 1957 (Revised 1983) although the certificate itself will not specifically state that it was certified under s 32(2) of the 1957 Ordinance. The entries in X's certificate of birth constituted strong presumptive evidence that the deceased and the defendant were parents of X and they corroborated the evidence of the defendant that X was the child of the deceased and that she gave birth to him. Indeed, these entries showed that Y and Z were not X's parents.

(2) The failure on the part of the plaintiff to call either Y or Z as witnesses gave rise to the inference under s 114(g) of the Evidence Act 1950 that the evidence, if it had been produced, would have been unfavourable to the plaintiff. In fact, Y and Z, called as witnesses by the defendant, gave evidence unfavourable to the plaintiff in that they said that X was not their child as alleged by the plaintiff.

(3) Having regard to the evidence, the defendant was well within the child-bearing age of a woman when she gave birth to X. Neither could any inference be made that the deceased was impotent or sterile merely because he had no issue earlier on from his two marriages.

(4) Section 112 of the Evidence Act 1950 had no application in the instant case as the issue was not concerned with the legitimacy of X but whether X was the issue of one or another set of lawfully wedded parents.

(5) As the plaintiff's case was based on mere assertions of herself and that of the other witnesses, she had not established her claim.

Legislation referred to
Births and Deaths Registration Act 1957 ss 14, 32(2), 33(1) & (2)(b)
Births and Deaths Rules 1958 r 7
Evidence Act 1950 ss 112 & 114(g)

Wan Mustapha for the plaintiff.
MS Nayagam for the defendant.

Cur Adv Vult

KC Vohrah J: Is Tiu Pang Hua (Pang Hua) the son of Tui Jock Soon (deceased) and Ang Mek Chong, the defendant? The plaintiff says Pang Hua is not. The plaintiff says Pang Hua is instead the grandson of the defendant and the step-grandson of the deceased. The defendant maintains that Pang Hua is the son of the deceased and herself.

The reason for the dispute? Four pieces of land, one of which has a house on it and all these properties, the plaintiff alleges, comprise the estate of the deceased. The plaintiff claims she is a niece of the deceased and that she and one other niece and a nephew of the deceased